

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of

Petition of the Greater New York Corporation of the Seventh-day Adventists Seeking a Declaratory Ruling that a Zoning Ordinance of the City of Yonkers, New York is Preempted Pursuant to § 25.104 of Commission Rules	) ) ) ) ) ) )	Application File No. 89-SAT-DRZ-98
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**MEMORANDUM OPINION AND ORDER**

**Adopted: March 22, 2000**

**Released: March 23, 2000**

By the Chief, International Bureau:

**I. Introduction**

1. By this Memorandum Opinion and Order, we grant the petition filed by the Greater New York Corporation of Seventh-day Adventists ("Petitioner"). The Petition states that the City of Yonkers ("City") and the Yonkers Zoning Board of Appeals ("Zoning Appeals Board") have refused to approve Petitioner's request for a building permit to locate a satellite earth station on its property. We find that the application of the zoning ordinances by the Zoning Appeals Board both "materially limits ... reception of satellite earth station antennas" and "imposes more than minimal costs on users of such antennas."<sup>1</sup> We also find that the City has failed to demonstrate that the ordinance in question is reasonable because it fails to state a clearly defined health, safety, or aesthetic objective that is stated in the text of the regulation itself. We preempt Section 43.80(P) of the City of Yonkers zoning code to the extent that it applies to satellite earth station antennas.<sup>2</sup>

**II. Background**

2. The Petitioner seeks a Declaratory Ruling that a zoning ordinance of the City is preempted by Section 25.104 of the Commission's rules. The City's ordinance provides that any "radio, radio-telephone or television tower or mast" is a "special exception use" if it is located within certain zones specified in a chart. That chart was referenced in the ordinance and specified what zoning restrictions on satellite earth stations applied in different neighborhoods in the City.<sup>3</sup> The City ruled that this provision applied to Petitioner's satellite earth station

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<sup>1</sup> Petition at 3.

<sup>2</sup> 47 C.F.R. § 25.104.

<sup>3</sup> Petition, Exhibit 1 at 1.

antenna, which was 7.5 feet in diameter. Under its ordinance, proposed uses of land that are classified as “special exception” are not approved through the City’s normal zoning procedures but must be decided by the Zoning Appeals Board after paying the required \$1,600 in fees.<sup>4</sup> The Petitioner contends that, under the City’s land use regulations, once a matter is in the hands of the Zoning Appeals Board, that board is free to deny an application for a satellite earth station antenna for any reason, and that in this case the reason appears to be concerns regarding increased traffic and limited parking.<sup>5</sup> The Petitioner requested and received a hearing before the Zoning Appeals Board,<sup>6</sup> which unanimously voted to deny the Petitioner's request for a special exception and required removal of the satellite earth station antenna.<sup>7</sup>

3. The City failed to respond to the Church's Petition and offers no defense of its ordinance,<sup>8</sup> despite being duly served by Petitioner in accordance with Commission procedures.<sup>9</sup> As a result, the record does not contain any direct rebuttal by the City to the Petitioner's arguments. Given the City's failure to respond, the facts as represented by the Petitioner are uncontested.<sup>10</sup>

### III. Discussion

4. The Petitioner contends that the City's ordinance violates Section 25.104 of the Commission's rules,<sup>11</sup> because it materially limits reception of satellite earth station antennas,

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<sup>4</sup> Petition at 6. Petitioner states that there is a \$1,500 fee for applying for a special exception and a mandatory \$100 sign rental. Petitioner also states that the total cost of its satellite antenna and all related equipment was \$3,000.

<sup>5</sup> Petition at 4-5.

<sup>6</sup> Petition at 2.

<sup>7</sup> Petition at 2-3. The Church complied with the City's order to remove the satellite earth station antenna on December 22, 1997. The church was permitted to maintain, until September 1, 1998, the seven foot mounting pole on which the antenna sits in expectation that an FCC decision on this petition might be rendered before that date. See the letter faxed to the FCC by Kevin J. Sullivan, Esq. on behalf of the Church, dated July 14, 1998.

<sup>8</sup> On June 16, 1998, in response to the Commission's May 29, 1998 public notice of the Church's petition for a declaratory ruling, the City sent a letter signed by Ronald Cabriele, Deputy Commissioner for the Department of Housing and Buildings, City of Yonkers. The letter stated, in part, that “[Petitioner]’s application... for a Special Use Exception Variance to legalize [its] satellite dish was denied by the [City’s] Zoning Board of Appeals in [their] decision rendered November 18, 1997.” The City did not, however, defend the validity of its ordinance.

<sup>9</sup> See letter from Kevin J. Sullivan, counsel for Petitioner, to Secretary, FCC (Feb. 2, 1998), stating that a copy of the Petition, the Public Notice (Report No. SPB-41) and the Commission's order, Preemption of Local Zoning Regulation of Satellite Earth Stations, *Report and Order and Further Notice of Proposed Rulemaking*, 11 FCC Rcd 5809 (1996) (“*Earth Station Preemption Order*”) have been served on the Commissioner of Housing and Buildings of the City.

<sup>10</sup> See Petition of Willie and Chun Ok Brown Seeking a Declaratory Ruling that a Zoning Ordinance of Burlington Township, NJ is Preempted Pursuant to Section 25.104 of Commission’s Rules, *Report and Order*, 12 FCC Rcd. 9626, 9628 (1997) (“*Brown Order*”).

<sup>11</sup> 47 C.F.R. § 25.104.

does not contain a clearly defined health, safety or aesthetic objective or standard,<sup>12</sup> and imposes more than minimal cost on users of such antennas.<sup>13</sup> The provisions of Section 25.104(a) of the Commission's rules, which apply to satellite earth station antennas with a diameter greater than two meters, state that any local zoning regulation that materially limits transmission or reception by satellite earth station antennas, or imposes more than minimal costs on users of such antennas "is preempted unless the promulgating authority can demonstrate that such regulation is reasonable."<sup>14</sup> For the purposes of this rule, "reasonable" means that the local regulation:

- (1) has a clearly defined health, safety, or aesthetic objective that is stated in the text of the regulation itself; and
- (2) furthers the stated health, safety, or aesthetic objective without unnecessarily burdening the federal interests in ensuring access to satellite services and in promoting fair and effective competition among competing communications service providers.<sup>15</sup>

The burden to prove reasonableness is on the promulgating authority.<sup>16</sup>

5. We conclude that Yonkers' zoning ordinance "materially limits" reception by satellite earth stations. In the present case, the City, through its Zoning Appeals Board, denied Petitioner's request for a permit and, further, required Petitioner to remove the satellite earth station antenna.

6. The Commission's rule also provides for preemption if a local zoning ordinance "imposes more than minimal costs on users of [satellite earth station] antennas."<sup>17</sup> In the present case, the total cost of Petitioner's satellite earth station antenna and associated equipment was \$3,000. Petitioner had to pay \$1,600 in fees and sign rental costs in order to obtain a hearing before the Zoning Appeals Board. In adopting this rule, the Commission stated that "any nonfederal costs including those relating to permitting or installation requirements must be very low or must be justified by the governmental entity imposing them."<sup>18</sup> In the present case, the City's zoning fees added more than fifty percent to the applicant's cost of obtaining satellite reception. A city would have to make a strong showing to demonstrate that such high fees were justified. In the present case, the City made no arguments in response to the Petition. It consequently failed to meet its burden of proving that a permit was necessary and that the fees it imposed were reasonable.

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<sup>12</sup> Petition at 5.

<sup>13</sup> *Id.* at 3.

<sup>14</sup> 47 C.F.R. § 25.104 (a).

<sup>15</sup> *Id.* at § 25.104 (a)(1) and (2).

<sup>16</sup> *Id.* at § 25.104(a). *See also, Brown Order*, 12 FCC Rcd at 9630.

<sup>17</sup> *Id.*

<sup>18</sup> *Earth Station Preemption Order*, 11 FCC Rcd at ¶ 41.

7. Next, we must consider whether the material interference and cost burdens imposed by the City's ordinance are justified under Section 25.104(a)(1) and (2). Under subsection (1), the City must show that the regulation has a clearly defined health, safety or aesthetic objective stated in the text of the regulation itself. In the present case, the City's zoning ordinance merely classifies a "[r]adio, radio-telephone or television tower or mast" as a "special exception use" in specified zones. It does not state any "clearly defined health, safety or aesthetic objective" in the text of the regulation.

8. Had the City responded to the petition, it might have been able to justify the reasonableness of the zoning restriction at issue by pointing to some statement of purpose not in the text of the regulation. Evidence regarding the City's position is contained in documents provided by the petitioner: specifically, a copy of section 43.80 (P) of the Yonker's zoning ordinances and a transcript of the final hearing during which the Zoning Appeals Board voted to deny petitioner's request for a special exception. Although these documents give an indication of the Zoning Appeals Board's reasoning in denying petitioner's request for a variance, they cannot adequately substitute for a filing by the City in this matter. Therefore, in light of the record before us, we conclude that the City has not met its burden of proof. The regulatory intent and purpose of the specific ordinance in question were never explicitly stated and the City has entered nothing into the record that "clearly defines" its objective.<sup>19</sup> We find that the ordinance in question is vague and overly broad. It fails to specify whether satellite earth station antennas are subject to the extra regulatory burden of the special exception process on health, safety or aesthetic grounds.

9. Even if the record of the Zoning Appeals Board hearing could be considered as the City's justification of its ordinance, it would be inadequate to do so. One of the board members<sup>20</sup> expressed concern that many people would attend the programs at Petitioner's church and this would have an adverse impact on parking in a neighborhood that had a significant proportion of residences.<sup>21</sup> He further added that "no material evidence [had been] submitted to date as to the entitlement of the requested use variance," thereby stating another ground on which Petitioner's request could be rejected. He also mentioned that the antenna could be seen from nearby houses and that Petitioner was unwilling to move its antenna to another place on its premises, thereby indicating that aesthetic concerns may have influenced the board's decision. The Zoning Appeals Board members then denied, by 6-0 vote, the Church's request for a variance but did not cite any ordinance as the basis for their decision.<sup>22</sup> Even if the record of Petitioner's special exception hearing could satisfy the requirement that the City state a purpose for its restrictions on satellite earth station antenna, the record of that hearing contains nothing

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<sup>19</sup> The *Brown Order* stated that "the regulatory intent of the specific ordinance in question was never explicitly stated and the Township has entered nothing into the record that 'clearly defines' its objective." *Brown Order*, 12 FCC Rcd 9626, at ¶ 17.

<sup>20</sup> Petition at 5.

<sup>21</sup> *Id.* at 2-3.

<sup>22</sup> *Id.* at 4.

that clearly defines the objective of the ordinance. With regard to the impact of the satellite earth station antenna on traffic, the board does not clearly state whether it is primarily concerned about the impact of congestion on the residential neighborhood or with concerns about public safety. Because it has not clearly defined its goals for this ordinance restricting installation of satellite earth station antennas, the City has not met its burden of showing that the restrictions are reasonable. Not only is the purpose of the restriction not clearly stated in the text of the ordinance, nothing in the record indicates that the City's action in denying the permit was based on a clearly defined health, safety or aesthetic objective. We therefore conclude that the City of Yonker's Zoning Ordinance 43-80(P) is inconsistent with Section 25.104 of the Commission's rules because it does not state a clearly defined health, safety or aesthetic objective.<sup>23</sup> Consequently, we grant the petition before us and find that Section 43-80 P of the City of Yonkers Zoning Ordinance is preempted by Section 25.104 (a) of the Commission Rules to the extent that it applies to satellite earth station antennas.

#### V. ORDERING CLAUSE

10. Accordingly, IT IS ORDERED, pursuant to authority delegated to the Chief, International Bureau (47 C.F.R. § 0.261 (a) (15)) and Section 25.104 of the Commission's rules, 47 C.F.R. § 25.104, that the Petition for Declaratory Relief (89-SAT-DRZ-98) IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Donald Abelson  
Chief, International Bureau

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<sup>23</sup> See Petition at 2 and Exhibit D at 1-2. The City also cited Petitioner for failure to obtain a building permit, failure to obtain a Certificate of Occupancy and for changing the nature of its occupancy without required permits. We do not rule on whether these ordinances materially limit reception from satellite earth stations and we therefore do not preempt them.